

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CIVIL NO. 10-271

Trenton, New Jersey  
October 24, 2011

APPEARANCES:

FARER FERSKO

BY: DANIEL L. SCHMUTTER, ESQ.,  
For the Plaintiffs.

GREGORY A. SPELLMEYER, DAG

For the State of New Jersey.

ZISA & HITSCHERICK

BY: CRAIG M. POGOSKLY, ESQ.,  
For the City of Hackensack.

1                   October 24, 2011.

2                   THE COURT:   Who is Mr. Schmutter?

3                   MR. SCHMUTTER:   I am, your Honor.

4                   THE COURT:   I can't read your name on the list, I'm  
5   sorry.

6                   MS. DISTLER:   Mary Distler.

7                   THE COURT:   Thank you.

8                   On the other side we have?

9                   MR. SPELLMEYER:   Gregory Spellmeyer.

10                  THE COURT:   From the state and you're Mr. Pogoskly?

11                  MR. POGOSKLY:   That's correct.

12                  THE COURT:   You have folks with you, Mr. Schmutter?

13                  MR. SCHMUTTER:   Yes, Judge.

14                  THE COURT:   Who do you have?

15                  MR. SCHMUTTER:   I have Scott Bach, who is one of the  
16   plaintiffs; I have Robert Viden, the owner of Bob's Sports  
17   Shop, and I also have Mr. Alonso, who submitted an affidavit  
18   and just Mr. Deere, who is just with us.

19                  THE COURT:   Nice to see you, gentlemen.

20                  I've reviewed a few things in preparation for this.  
21   These motion have been around for awhile, but, of course, we  
22   go back to the Court's original opinion filed in June of 2010,  
23   in connection with the first go round on the statute and in  
24   that opinion, I dismissed certain claims that the plaintiffs  
25   had brought and asked the parties to go back to the drawing

1 board, as it were, and file supplemental briefs because the  
2 circumstances surrounding the implementation of the statute  
3 were very much in flux. We now have the briefs which began  
4 being filed in January of 2011, and I don't think this matter  
5 was fully briefed until sometime in the middle of the summer.

6 So while it's been gestating for awhile,  
7 nevertheless, there's been some activity.

8 Why don't we start with you, Mr. Spell? Give us some  
9 idea as to what the status is on the implementation of the  
10 statute. Are there forms that are intelligible, available for  
11 those who want to file for an exemption to the statute, to the  
12 restriction in the statute and have the applications for  
13 permits been subject to some uniform policy in the state and  
14 then we'll get to Hackensack and figure out what their  
15 policies are, where they stand and then we'll hear from you.

16 MR. SCHMUTTER: Thank you.

17 MR. SPELLMEYER: Okay, your Honor.

18 Thank you.

19 The forms are available. The process is available.  
20 I think it's fair to say that the forms and the process are  
21 available to these plaintiffs and have been available to these  
22 plaintiffs so we're really just talking about now that those  
23 forms and that process is available, consider plaintiffs'  
24 challenge under the procedural due process challenge to  
25 whether there's adequate process thereto under any applicable

1 constitutional protection.

2           With regard to the application for a permit, that  
3 guidance had gone out over a year ago that, yes, an applicant  
4 could ask for more than one or file or submit more than one  
5 application at a time. I believe that's uniform now. That's  
6 guidance from the New Jersey State Police has not changed and  
7 I don't believe there are issues with that now, certainly as  
8 to the state's perspective.

9           If you'd like, I'll get into my motion or if you want  
10 to hear more.

11           THE COURT: Let me ask you factually, what is the  
12 state of affairs on the two things, first of all, on the  
13 request for exemptions, what's our real life experience? How  
14 many requests for exemptions are coming in, are they being  
15 processed in a timely, competent fashion and are the  
16 exemptions being granted, are they being denied, what's the  
17 real life practice?

18           MR. SPELLMEYER: Your Honor, I don't have that  
19 information with me here. I can get it, provide it, but I  
20 don't think that it's necessary to dispose of the motion in  
21 favor of the state, because regardless of those numbers, the  
22 process is in place and all the protections to which an  
23 applicant is entitled are there.

24           I would even submit in the first instance that there  
25 are no constitutional due process protections owed to an

1 applicant in this scenario, but, nevertheless, if the Court  
2 were to find that constitutional protections apply, there are  
3 certainly adequate process here and post-deprivation process  
4 given to any applicant who is denied an exemption.

5 THE COURT: I'm not suggesting that I necessarily  
6 need the data in order to decide the motions because I tend to  
7 agree with you I don't, but it would be nice to know.

8 MR. SPELLMEYER: I'm sorry, I didn't have the  
9 forethought to bring that with me.

10 THE COURT: What about permits, do you have any idea  
11 what the real-world experience is on getting permits to  
12 purchase?

13 MR. SPELLMEYER: Aside from the, you know, the prior  
14 issue and between plaintiffs and Hackensack, as far as I  
15 understand, that's a non-issue; that applicants who seek to  
16 apply for more than one permit to purchase are able to do so.  
17 I haven't heard from Mr. Schmutter that that's a problem in  
18 any other jurisdiction. Certainly as to the State Police, I  
19 don't think it's an issue and, again, the guidance from the  
20 State Police went out over a year ago and I'm not aware of any  
21 other problems with regard to that.

22 THE COURT: As far as the State is concerned on the  
23 question about taking out permits to purchase, as far as you  
24 know, it's limited to a dispute between the plaintiffs and  
25 Hackensack?

1 MR. SPELLMEYER: At this time at least, yes.

2 THE COURT: All right.

3 MR. SPELLMEYER: I think there were prior issues that  
4 I think have been clarified or remedied.

5 THE COURT: Okay.

6 What about it, Mr. Schmutter?

7 MR. SCHMUTTER: Your Honor, Mr. Spellmeyer's mistaken  
8 about the issue of permits. We submitted the affidavit of Mr.  
9 Alonso which indicates that well after the guidance came from  
10 the State Police, the Town of Harrison also was and is still  
11 denying the right to obtain multiple permits to purchase as is  
12 permitted by law.

13 It's our view, and the record I believe shows, that  
14 Hackensack is not complying with what they said they were  
15 going to comply with. It's not of record, but we received  
16 other complaints from other members of the association about  
17 problems. We heard about a problem just last week about  
18 Linden which I didn't have time to submit. Linden is creating  
19 problems.

20 Here's the problem, Judge: This is really why this  
21 is an issue. Notwithstanding the guidance that was issued  
22 last year by the State Police, these municipalities just  
23 either still don't know the law, they don't care even when you  
24 tell them because in Harrison, they have been told that the  
25 State Police issued a guidance, they have been told to read

1 the letter, they still won't give permits to purchase more  
2 than one permit to purchase as the issue of the code requires.

3 This is one of the problems, which goes to the  
4 mootness question, we can't keep running in here every time we  
5 hear from one of our members that complains about their police  
6 department and keep amending the complaint. We couldn't just  
7 -- we could have but that would have made this litigation --

8 THE COURT: On this subject, what is it that you ask  
9 the federal court to do? There's a cross-motion and there's a  
10 position here that I ought to just -- the federal court has no  
11 business being in the middle of the implementation of the  
12 state statute which requires permits to be available. What is  
13 it that you would want this court to do for you?

14 MR. SCHMUTTER: Your Honor, we're seeking a judgment  
15 against Hackensack, a judgment -- both injunctive relief and  
16 declaratory judgment as to the prohibition on restricting the  
17 number of permits to purchase that can be obtained.

18 There are two reasons for it. First, Hackensack is  
19 not doing what they promised this Court a year ago.  
20 Hackensack came here, promised this Court they immediately  
21 changed their policy by allowing multiple permits. There was  
22 an affidavit from Mr. Zeeza that he met with the Chief of  
23 Police. Interestingly, we never got any affidavit from the  
24 Chief of Police as to what the policy was, we never saw a  
25 written policy, they never agreed to any written agreement,



1 they wouldn't enter into a consent order or stipulation and  
2 they wouldn't enter into an agreement or any binding document  
3 of any sort, in contrast to Washington Township who was the  
4 first defendant on this issue and Little Egg Harbor who  
5 immediately conceded they were wrong, they signed a  
6 stipulation that was so ordered, they paid a small nominal  
7 amount of counsel fees and they are out of the case.

8           Hackensack came and told this Court they were doing  
9 it, but a year later, Mr. Furio, the supplemental affidavit of  
10 Mr. Furio came in and said a year later there was still a sign  
11 up in the police department saying one permit per month. When  
12 he went in and told the clerk I would like to apply for four  
13 permits, which he is allowed by law to do, the clerk pointed  
14 to the sign and said no, only one permit per month. This is a  
15 year after Hackensack came in and told this Court they stopped  
16 doing that.

17           THE COURT: My question to you is what is it you want  
18 me to do? Assume, assume I agree with you and I grant the  
19 relief you seek, what is it? I can enter some sort of an  
20 order that require police departments in the State of New  
21 Jersey to make sure that they don't have a policy preventing  
22 people from getting more than one permit to purchase a month?  
23 Fine. So now your members go to a police station and they  
24 want more than one permit and they're told they can't have  
25 them, now what?

1           MR. SCHMUTTER: Well, I think showing them a judgment  
2 of a federal judge is better than showing them a directive of  
3 the State Police, since they're not taking the police  
4 directive seriously, I think they'll take the judgment of the  
5 federal court more seriously.

6           THE COURT: I didn't know I had that much clout.

7           MR. SCHMUTTER: You would be surprised, Judge.

8           More than just that, also specifically we're seeking  
9 leave against Hackensack because Hackensack is not doing what  
10 they promised this Court to do. They can't be trusted to come  
11 into court and promise they're changing the policy because  
12 they're playing games.

13          THE COURT: Let's get over this permit issue, let's  
14 get this out of the way first.

15          How about it, Mr. Pogoskly, what's going on over  
16 there?

17          MR. POGOSKLY: Your Honor, I think this is a bit of a  
18 red herring myself.

19          THE COURT: Let me ask you this: If one of us were  
20 to decide we want to start purchasing firearms and we go to  
21 Hackensack and ask for more than one permit, will we get them?

22          MR. POGOSKLY: Yes, as Mr. Furio, who allegedly is  
23 the one claiming he's been denied, as we put in our papers,  
24 you saw on numerous occasions he's typed up multiple  
25 applications saying I want four, I want three. He's come in,

1 nobody's sent him away with those applications. They've all  
2 been accepted. He's been given those multiple permits each  
3 time. He hasn't been denied at all, so this discussion about  
4 he's being denied these permits is just not true. They have  
5 gone on numerous occasions.

6 Matt Cobin's certification annexed I believe on at  
7 least three permits that he prepared, brought in, they each  
8 time they went before a captain of the police department, yes,  
9 you want three permits, fine, sure, we'll process your  
10 application. Nobody said, here, take your application, we're  
11 not taking it. They have been accepted each time, processed  
12 through the state in the usual course and he's gotten these  
13 permits. So there is nothing here to suggest that Hackensack  
14 is not accepting and processing these applications.

15 MR. SCHMUTTER: There is, Judge. First of all, Mr.  
16 Furio is not the only plaintiff. The Association of New  
17 Jersey Rifle has an organizational standing as a plaintiff in  
18 this case and has other members that live in Hackensack. The  
19 mere fact that Mr. Furio himself individually can go in and he  
20 knows the policy, even though the big sign says one per month,  
21 he happens to know because he's a plaintiff in this case.

22 THE COURT: Well, is there still a sign in the  
23 Hackensack Police Department?

24 MR. POGOSKLY: No, your Honor.

25 THE COURT: That says one permit per month?

1           MR. POGOSKLY: No. I personally walked in there. I  
2 didn't see a sign. I don't know if that was a remnant from  
3 some prior time. I looked at a very simple sign that looks  
4 like I could have made it, I don't know. I didn't see it  
5 after I received these papers. I don't know if anybody's been  
6 there in the past few weeks to check, see if it's there but  
7 there is no sign.

8           MR. SCHMUTTER: Judge, I don't know if -- I mean, I  
9 know it's not simply a matter they forgot to take down the  
10 sign because the clerk at the desk was telling people one per  
11 month. In fact, when Mr. Furio went upstairs to the  
12 lieutenant to get his permit signed off on so they could be  
13 processed, there was a guy standing behind him, when the --  
14 when Furio said to the lieutenant, I'd like four permits, and  
15 the lieutenant said okay, the guy behind him said, I didn't  
16 know you could get more than one permit, I want two permits.  
17 So obviously other people are being misled by that sign.

18           THE COURT: I'm curious to know, if the statute says  
19 you cannot purchase more than one gun a month and if I've  
20 already found that statute to be appropriate, why would  
21 someone want to get permits to purchase more than one a month?

22           MR. SCHMUTTER: The permits are valid for 90 days.  
23 They can be renewed for 90 days so you can lawfully purchase  
24 up to six permits and the permit acquisition process is very  
25 onerous, time consuming and difficult.

1           THE COURT: So you can cover yourself for a period of  
2 time by doing more than one permit?

3           MR. SCHMUTTER: People do it frequently because of  
4 the process. So again, Judge, Hackensack comes in here and  
5 says everything's fine, but when they come in here last May  
6 and they promised you everything is fine, and then the next  
7 year it's still not fine because we go in there and we see a  
8 big sign and the clerk is telling people one per month,  
9 there's something wrong. They're playing a game.

10           So maybe the case of Furio himself as an individual  
11 can go in there and get permits because he's a plaintiff and  
12 he knows that the policy -- that the law says more than one  
13 per month, we have no reason to believe anybody else knows  
14 that, especially when there's a sign and they're telling  
15 people the wrong information.

16           This is a game they're playing. They didn't tell  
17 anybody about it because they still wanted to restrict  
18 permits. So I think Hackensack is clearly not to be trusted  
19 in this case. It's one of these shame on me once, fool me  
20 twice shame on me kind of things.

21           THE COURT: Yes, sir.

22           MR. POGOSKLY: I would just indicate, first of all,  
23 it sounds like the plaintiff is putting in an affirmative  
24 obligation on the City to basically educate everybody in the  
25 change of the law. It's not -- I would submit it's the

1 obligation of the people who say this is the law on gun  
2 permitting when you walk into the door. These people --

3 THE COURT: No, I don't think that's the argument  
4 he's making.

5 I think the argument he's making is that you can't  
6 have a policy, practice or direction which gives bad  
7 information, right?

8 MR. SCHMUTTER: Yes, Judge.

9 Beyond that, given their track record of not really  
10 coming clean with the Court, they can't be trusted at this  
11 point. We have no reason to believe, other than Vince Furio,  
12 we have no reason to believe they're really complying with the  
13 law, no matter what they say because they told the Court that  
14 in 2010.

15 MR. POGOSKLY: Nor is there any evidence that anybody  
16 has been --

17 THE COURT: Okay.

18 This is one of those cases where what is really being  
19 requested here is simply a court order requiring people to  
20 follow the law. We see those from time-to-time, but all  
21 right. Let's hear from the State.

22 MR. SCHMUTTER: One another twist on that.

23 There's a second argument as well, other than  
24 specifically as to Hackensack, this is a case and again goes  
25 to the mootness questions. This is case that falls into the

1 capable repetition and review category because if you see the  
2 pattern, the municipalities violate the law, we sue them, then  
3 they cave after we've sued them, it will never be decided.

4 THE COURT: I get it.

5 I keep coming back to it, is how can I help you? I  
6 mean other than to sign something that requires the  
7 superintendent of the State Police to send this to all police  
8 departments in the state one more time.

9 MR. SCHMUTTER: We don't even need that, Judge.  
10 Giving us relief against Hackensack, signing the order we  
11 submitted will do exactly what we need and it will make a big  
12 difference in terms of both Hackensack to keep them serious  
13 about complying with the law and other municipalities. We  
14 will take this to other municipalities and I think they'll  
15 take it more seriously than the State Police letter because  
16 they're not taking it seriously.

17 THE COURT: Mr. Spellmeyer, tell me about your  
18 motion.

19 MR. SPELLMEYER: Your Honor, sorry to beat a dead  
20 horse, but to bring that last argument back to where I think  
21 you started it, quickly, the allegation is that municipalities  
22 are perhaps violating the law. The law is state law and the  
23 presents a jurisdictional question to this Court. The  
24 Pennhurst issue, that's a state law issue. This Court doesn't  
25 have to get involved and the plaintiffs have every right to go

1 to the state court and get the same kind of order from the  
2 state court. It would be a state court issue which the state  
3 court is perfectly available and more appropriate to resolve  
4 that issue.

5 As to my affirmative motion to dismiss plaintiffs'  
6 complaint, I think the briefing has been helpful to clarify  
7 the issue. The issue of plaintiffs' claim is essentially the  
8 same sort of argument that the legislative process or the  
9 legislative intent is somehow not being achieved through the  
10 exemptions that the exemption process, that the State Police  
11 promulgated through its form; that, again, is a Pennhurst  
12 issue. It's potentially a complaint that the exemption  
13 process is not complying with what the state legislature said  
14 the law is intended to achieve. It's a Pennhurst issue,  
15 should be resolved in the state courts.

16 Even if this court were to find that it has  
17 jurisdiction over that, it's not a Pennhurst issue. There's  
18 just no constitutional protection there.

19 It's a procedural due process, it has to be founded  
20 in some sort of property right protected by the Constitution.  
21 There is no such property right there. Even if there were  
22 property right, you have to look at what process is being  
23 given. The process being given here is a fair process. There  
24 aren't any undo barriers. It's just a normal process to go  
25 through any other type of regulation to get an application or



1 an exemption and if you're denied, the statute itself provides  
2 that you have 30 days to go to the Superior Court of New  
3 Jersey so there's post-deprivation remedies that are available  
4 which would comply with any due process requirement that the  
5 court were to find.

6 Unless you have any questions about that, that's all.

7 THE COURT: What's your perspective on the  
8 exemptions? What is the real-world experience on those who  
9 want to file for an exemption?

10 MR. SCHMUTTER: In the affidavit in Scott Bach we  
11 submitted, supplemental certification of Scott Bach, he tried  
12 to do exactly what these forms require. The forms require  
13 that if you want to buy two or three handguns at the same  
14 time because you're a collector, which Mr. Bach is, you first  
15 have to identify the specific handguns. So let's say there's  
16 a dealer in Pennsylvania who has a matched set, three antique  
17 Colt revolvers and he's a collector of Colt revolvers, the  
18 first thing he has to do is go to the dealer and say, excuse  
19 me, I'm from New Jersey. We have a law that says I can't buy  
20 three at the same time. I have to wait, buy them over the  
21 course of three different months, will you hold them for me?  
22 I have to go apply for an exemption. I can't tell you how  
23 long it's going to take to be resolved and, by the way,  
24 permits and applications in New Jersey for firearms take an  
25 exorbitant amount of time, many, many months, or a permit to

1 purchase a handgun so the experience of obtaining permits or  
2 approvals in New Jersey for firearms is incredibly bad. So  
3 the first thing he has to say I have to make this application.  
4 I have no idea how long it's going to take. I want you to --  
5 I want you hold those, not sell them to anybody else and, by  
6 the way, I don't know if I'll get approval, so at the end of  
7 the day, you could wait six months or whoever long it takes  
8 and I may come to you and say, sorry, I can't buy them,  
9 meanwhile you may have had five buyers in here for that  
10 beautiful set of matching pistols. He tried this, the  
11 affidavit shows he tried this multiple times.

12 THE COURT: What is it you're complaining about?

13 MR. SCHMUTTER: I'm complaining about the requirement  
14 of identifying in advance by serial number the specific  
15 handguns to be purchased.

16 THE COURT: What's the constitutional basis for that  
17 problem?

18 MR. SCHMUTTER: The Constitutional basis is that the  
19 right to the exemption is a state law liberty of property  
20 interest that has been created by state law. You can't create  
21 a liberty of property interest by state law and take it away.

22 THE COURT: So you want it to be the case where the  
23 exemption does not require you to identify in advance those  
24 handguns, those firearms that you intend to purchase?

25 MR. SCHMUTTER: Correct. Really there is no reason

1 why the State has to know which handguns you're going to  
2 purchase because they're evaluating you as a purchaser.  
3 They're going to evaluate who you are. If you look at the  
4 statue, it says they evaluate you're a collector, they look at  
5 your background, they look at what you're doing. It's about  
6 the person.

7           The ostensible reason for the statute is to prevent  
8 straw purchases. So saying that I'm buying a particular  
9 pistol, you could also be a collector of Glock semi-automatic  
10 handguns. It doesn't matter whether you're buying a Glock  
11 semi-automatic pistol or antique colt pistol. The evaluation  
12 should be exactly the same; it's the person, it's the person  
13 that they care about.

14           THE COURT: So it's the property interest can be  
15 enforced or recognized prospectively?

16           MR. SCHMUTTER: I'm sorry, I don't understand.

17           THE COURT: Well, it's prospectively because you  
18 don't know exactly what firearms you're going to buy? You  
19 just know you want to apply to buy something.

20           MR. SCHMUTTER: Correct. I think, in fact, Judge, it  
21 ought to work exactly the way permits to purchase work. What  
22 people do, particularly collectors, is they will apply for  
23 multiple purchase permits to purchase in advance, knowing that  
24 they could come across a particular firearm that they want to  
25 buy immediately. If they waited -- I'm talking about single

1 purchases, forget about multiples, just single purchases. If  
2 they waited until they saw it, by the time they get their  
3 permit to purchase, it will be gone. A lot of people did  
4 this, they have permit to purchase in the process ready to go  
5 and since they last 90s, 180 days with the extension, they'll  
6 apply for a couple more permits. People do this constantly.  
7 That way they go to store, they go to a gun show or they see  
8 online, oh, look at that particular firearm, I'd like to buy  
9 that. It should work and can work exactly the same way with  
10 the multiple purchase permit -- multiple purchase approval  
11 where a collector or a competitor has -- makes the application  
12 and identifies themselves, they do whatever check they're  
13 going to do to make sure this person is not some straw  
14 purchaser and that way I've got my multiple permits.

15 In addition to having my permit to purchase ready  
16 when I see something, I also have my multiple purchase  
17 approval ready to go. I have them hand in hand. I go to a  
18 gun show in Pennsylvania or go online and see there's a  
19 beautiful set of revolvers or I'm in a local store and I  
20 happen to walk into the store and I happen to see something, I  
21 have my permits. The approvals have been there, I have been  
22 checked thoroughly, much more extensive than the federal,  
23 15-point background and I've got my purchase approval where  
24 they check me again.

25 So I have been checked so many times, I've got my

1 paperwork, I walk into the store or I go to the dealer, I  
2 present them with my paperwork, done. Then I can fill out --  
3 I have to fill out what the firearms are anyway. The  
4 purchaser has the serial number, the make, the model and  
5 that's a register that goes to the State Police and local  
6 municipality as well. All the paperwork is done, but it  
7 enables it to work properly.

8           The way they set it up, it's designed to fail. It  
9 simply is designed to make it impossible, incredibly difficult  
10 for New Jersey purchasers to acquire these things. It puts  
11 New Jersey purchasers at a tremendous disadvantage compared to  
12 out-of-state purchasers. That's the problem.

13           THE COURT: Do you want to respond to that?

14           MR. SPELLMEYER: Yes, thank you.

15           That argument to me sounds like it's a matter of  
16 interpretation of state law. What does the state law require?  
17 Is this the format that applies for the state law? It's a  
18 state law issue.

19           Getting beyond that, the law itself specifically says  
20 that information basically regarding the gun shall be  
21 provided. That's what the superintendent has just done what  
22 the law says. He's promulgated a form by which he's able to  
23 collect the information about what gun is to be sought to be  
24 purchased.

25           Further, there is no right either in this -- there is

1 no right in this law, which there has to be for plaintiffs to  
2 have any hope of prevailing, that there is no right to  
3 purchase a particular gun at a particular time. It's the  
4 right to be considered for an exemption to purchase a handgun.  
5 It's not a right to have a particular gun purchased at a  
6 particular time.

7 THE COURT: Okay.

8 MR. POGOSKLY: Your Honor, I wanted to touch on it  
9 before, but I want to say for the record, some of Mr.  
10 Spellmeyer's arguments as relates to there having to be some  
11 federal constitutional issue as Hackensack. Insofar as even  
12 if there's the validation of maybe Hackensack had a sign, did  
13 something that that is of no moment insofar as there is no  
14 deprivation even under procedural due process. I think the  
15 Court indicated and certainly in the ruling that the one gun  
16 law is a reasonable regulation on gun registration, and it was  
17 a property interest.

18 But, nevertheless, even if this is a procedural due  
19 process issue, the possibility of some errant clerk doing  
20 something, even if intentional, doesn't rise to that  
21 procedural due process merits so that even if you accept all  
22 of that contrary to the fact that the only plaintiff in this  
23 case who's making an allegation is the one who's gotten every  
24 permit he's applied for, that that in and of itself, the  
25 intentional or unintentional doesn't rise to that claim. The

1 claim must fail before this Court.

2 THE COURT: All right.

3 Thank you.

4 MR. SCHMUTTER: Your Honor, the Pennhurst issue? As  
5 far as Pennhurst goes, and we've gone back and forth on the  
6 first motion and these motions on Pennhurst, there is no  
7 Pennhurst issue as to the permit issuance question. There's  
8 been made no allegations against the State Police as an  
9 issuing authority. The allegations are solely against the  
10 municipalities and the law is clear, Pennhurst doesn't apply  
11 to municipalities. It is not a Pennhurst claim on the  
12 exemption question.

13 We are not claiming that they're violating state law,  
14 we're claiming, as the Court heard, it is a federal due  
15 process issue and the idea that -- the cases are pretty clear  
16 on this, the *Mills* case, *Paul* and *Swarthout*, that liberty  
17 property interests that are protected by federal law, are  
18 state-law created. So state law liberty property interest  
19 that's created is the right to apply for the exemption.

20 The process by which you get that is a violation of  
21 federal due process. It's a federal law issue.

22 Third, post-deprivation remedies don't help here  
23 because again, the problem is that you can't obtain the  
24 exemption in a way that's practical to use it. Having a  
25 post-deprivation remedy months later saying, all right, go to

1 the Appellate Division, yes, you had a right to get an  
2 exemption. By the way, the guns you want to buy are gone so  
3 it's really useless.

4           You need the ability to get the permit -- the  
5 exemption at the time that the product is available to  
6 purchase. That's the key.

7           The idea that you don't have a specific right to buy  
8 a specific handgun, that's not the point. The right is to be  
9 able to be a collector or competitor and exercise your right  
10 to be a competitor, collector by obtaining firearms in more  
11 than one at a time. That's the issue at stake. That's what  
12 the legislature said we can do, except that we can't because  
13 the State Police insist that we have to provide serial numbers  
14 in advance.

15           Now, as to Hackensack, I think they're saying that  
16 there is no federal due process issue with respect to the  
17 permits issue. We're not claiming it's federal due process.  
18 It's supplemental jurisdiction, pendent state law claim as to  
19 Hackensack which is under 1367.

20           I guess finally -- I guess that's really it, Judge.  
21 The real concern here is that the Court has before it a  
22 process that simply doesn't work.

23           Oh, also, I'm sorry, counsel mentioned, for the State  
24 mentioned that the statute says the information has to be  
25 provided, but it doesn't say specifically that you have to



1 provide serial numbers in advance, otherwise your application  
2 won't be processed which is how the State Police are applying  
3 it, so the legislature provided some flexibility that the  
4 State Police are applying it in a way that defeats the  
5 process. So it's the State Police form and State Police  
6 procedure that makes the process impossible or virtually  
7 impractical to apply.

8 THE COURT: Anything else?

9 Thank you all for coming. I'll reserve and you'll  
10 have an opinion.

11 (Matter concluded.)

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